United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7524

To be argued by
Bernard Meyerson

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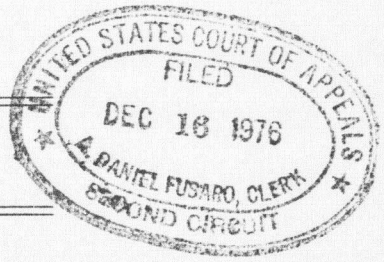
NORTH SHORE TRAVEL SERVICE, Inc.,
Plaintiff-Appellant,

against

JOSEPH F. HINTERSEHR, etc., et al.,
Defendents-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York.



BRIEF OF PLAINTIFF - APPELLANT

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BRIEF OF PLAINTIFF-APPELLANT.

STATEMENT OF ISSUES PRESENTED ON REVIEW.

1. Can a finding in a replevin action in the New York Supreme Court, that the defendants were entitled to a return of its blank tickets because plaintiff had earned enough demerits to warrant a 15 day suspension be considered res judicata in an anti-trust action for putting plaintiff out of business for a continuous period of over two (2) years ?

2. Did defendants violate the Sherman Anti-trust Act by

giving an insurance company a monopoly of the bonds they require and then having bonding company do their bidding in cancelling an Irrevocable Letter of Credit without notifying appellant, to secure the cooperation of a bank, and then direct bonding company to cancel appellant's bond and to respect this cancellation even though it was void for failure to return premium with cancellation ?

3. Did defendants violate the Sherman Anti-trust Act when they had a replevin execution illegally issued, put same in newspapers, and then took the newspaper to appellant's clients, who then rushed to have appellant redeem issued airline tickets in approximate sum of $9,000 and thereafter defendants refused, under false pretext, to redeem the tickets in an attempt to impoverish appellant ?

FACTS.

Plaintiff travel agency brought this action against the Air Transport Association of America [A T A] and a number of airlines who are part of this association of air carriers, seeking treble damages on the basis of violations of the Sherman Act, 15 USC, Sections 1 and 2 on the ground that the termination of plaintiff's right to do business was a group boycott.

The events herein started when counsel for the A T A vowed to get North Shore Travel (76 a). This was done by rushing North Shore's check to the bank instead of through the usual channels and having the check returned marked "drawn on uncollected funds" while Notice was sent to North Shore stating that the check was paid (78 a). A Replevin Action was commenced with a writ of Seizure and Plaintiff was then suspended for 15 days. The value of the blank tickets (which were of no value [Antar v. T. W. A., 66 Misc. 2d 93 aff'd. 37 App. Div. 2d 921])was fixed in the writ as worth $452,000 thus North Shore would have needed a bond of nearly one-million dollars to get these tickets back [this was unconstitutional].

The demand was made by North Shore Travel's counsel that a bond be filed before the writ of seizure be issued (127 a). The writ recited that the bond was filed (127 a). However, the bond was never filed and the Sheriff was fraudulently induced to

seize these useless blank tickets. This seizure was put into the newspaper (160a) and some individual, on behalf of ATA, who knew who plaintiff's clients were, went to these clients with the newspaper clipping (73a). This, of course, created panic among the clients and they ran to plaintiff for refunds in the amount over $9,000. As part of the scheme to deprive plaintiff of funds, ATA has refused to refund this money. It claims more is owed to it but has never given plaintiff any specific proof of same (126a).

Plaintiff applied to be reinstated when suspended and no one opposed it within the required fifteen (15) day period. On the 16th day a teletype from American Airlines was received. [It was admitted on trial that no moneys were owed American Airlines and that the teletype was sent out of spite (54a, 97a)].

All agencies must be bonded and Marsh & McLennan of Washington, D.C. have the monopoly of these bonds, known as ATC Schedule Bond, and thus must take their orders from the Air Traffic Conference [ATC] (76a), a division of ATA. Marsh & McLennan first aided ATC in its replevin suit (77a) and then it cancelled its bond at the request of ATC so plaintiff could be indefinitely suspended (87a). However, this cancellation of bond was void (87a, 88a) and thus this indefinite suspension also was a violation of the Sherman Anti-trust Act but it had the effect of putting plaintiff out of business.

THE LAW.

The Sherman Anti-trust Law is well known to the bench and bar. However, these defendants normally come under the exceptions to the Law and, therefore, there is a scarcity of Authorities covering this point. However, prior to the institution of the within action a similar case came before the Judge Stewart in the Southern District Court, in the case of Lowe Trustee v. International Air Transport Association, et al., No. 69 Civ. 4788, Opinion No. 43694 filed January 9, 1976. This opinion, in great detail, covers all the statutes and cases that deal with this subject and, in the opinion of the writer of this brief, it is the only treatise on this specialized part of the law that is available at this time. This opinion covers 29 pages but we will only place some excerpts herein to acquaint this Court with the essential parts of same:

> "Shortly thereafter it appears that Pan Am informed the IATA that it had declared Hefler in default. This triggered a review of Hefler's status by the Agency Administration Board ["AAB"], the subcommittee of the IATA authorized under Resolution 810a to approve or disapprove travel agents." [page 5.]
>
> "* * * The testimony is in complete agreement that there was no discussion of Hefler's rebuttal materials or any consideration of the issues Hefler raised, at this meeting." [page 9.]

The other important pages [nos. 17, 18, 20, 21, 22] of the Opinion are as follows:

Page 17.:

"When considering whether the aforementioned violations of the CAB requirements result in a loss of defendants' statutory grant of antitrust immunity, we note that the courts have consistently demanded strict compliance with prescribed procedures in order for immunity to attach.[3/] United States v. Socony - Vacuum Oil Co., 310 U.S. 150 (1939); Chicago & N.W. Ry. Co. v. Peoria & P. U. Ry. Co., 201 F. Supp. 241 (S. D. Ill. 1962). As the Supreme Court said in Socony, "Congress had specified the precise manner and method of securing immunity. None other would suffice" (310 U. S. at 226-7)."

"In the instant case, the method by which defendants could have secured antitrust immunity for their action of cancelling a travel agent's approval has been specified by the CAB which has set forth the particular procedures which have to be followed. 29 CAB 264-4; 33 CAB 170; Resolution 810a-C. The CAB also detailed the reasons for requiring strict compliance with these procedures:

> It must always be realized that this entire system of joint carrier screening of travel agencies is a substantial departure from the normal free competitive practices of our economy, and that it would be clearly in violation of the Federal antitrust laws were it not for the immunity extended by section 414 of

---

3/ "Our situation is very different from that in Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973), reh. den. 410 U.S. 975 (1973), where the proper CAB approval procedures had been carefully followed, and the Court was faced with the question of whether statutory immunity from the operations of the antitrust law did not apply to defendants' actions because they involved matters beyond the scope of the CAB's Congressional mandate and thus beyond its power to approve and confer immunity."

Page 18.:

the Act. This is not a situation, therefore, where we can grant to the carriers on the basis of management expertise or discretion substantial freedom to make decisions without detailed Board supervision and control."

29 CAB at 264-5.

"The particular importance of the CAB mandated due process [4/] requirements was underscored when the Board stated:

> Through the ATC [and IATA] system the carriers hold life and death power over the travel agencies and it is unthinkable that the carriers should exercise these powers without giving full notice of their reasons and providing ample opportunity for appeal."

29 CAB at 264-5.

"Further, less than six months before the IATA began its review of Hefler, the District Court concluded in Caceres, supra, in which the IATA were defendants, that antitrust immunity would be eliminated where the notice which the IATA sent a rejected agent failed to comply with the terms of the CAB approval of Resolution 810a. 46 F.R.D. at 93. Defendants had thus been instructed as to the probable consequence to their antitrust immunity should they fail to comply with the CAB procedures."

4/ "In this connection, we are aware of the importance placed on procedural safeguards by the Supreme Court when considering whether certain actions could be covered by an implied repeal of the antitrust laws. Silver v. New York Stock Exchange, 373 U.S. 341 (1963)."

Page 20. :

"*** IATA, have adopted Resolution 810a in which they agreed that agents like Hefler must have IATA approval in order to be eligible to receive commissions from the air carriers on international air ticket sales, and in order to conduct business with the carriers on a credit basis (Resolution 810a-I(1); tr. at 11 - 14, 249 - 53). Pursuant to the terms of Resolution 810a, defendants have further agreed that "cancellation of approval of any agent . . . by the appropriate [IATA] Agency Sub-Committee shall be honored by all Members of IATA" [Resolution 810a - C(9)]."

"Since no one may sell air transportation tickets at a rate other than that approved by the CAB (49 U. S. C. Section 1373), travel agents only make money from such sales through commissions paid by the air carriers (tr. at 11 - 14). Thus, the cancellation of Hefler's approval by the IATA, and the honoring of this decision by the member carriers, effectively precluded Hefler from doing business as a retailer of international air transportation (Caceres, supra, 46 F. R. D. at 90; 29 CAB at 264-5)."

"Clearly, the fact that all defendant carriers are bound to honor the AAB's decision to cancel deprives them of the freedom to decide independently whether they want to deal with Hefler, and if so, under what terms. Consequently, defendants' implimentation of their Resolution 810a agreements constitutes a concerted refusal to deal with Hefler under the *** "

Page 21. :

"*** terms and conditions extended to other travel agents, and thus constitutes a group boycott by competitors. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959); Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961); Vandervelde v. Put and Call Brokers and Dealers Ass'n., 344 F. Supp. 118, 139 (S.D.N.Y. 1972). Such boycotts have been generally held to be per se violations of Section 1 of the Sherman Act. Klor's, supra; Northern Pacific Ry. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). "

"Exceptions to the perse rule have been recognized where trade association boycotts have been determined to be reasonable in furtherance of legitimate policies. Deesen v. Professional Golfers' Ass'n. of America, 358 F. 2d 165 (9th Cir. 1966), cert. denied 385 U. S. 846 (1966), reh. denied 385 U. S. 1032 (1967), Bridge Corp. of America v. America Contract Bridge League, Inc., 428 F. 2d 1365 (9th Cir. 1970), cert. denied 401 U. S. 940 (1971). In the instant case, however, the CAB has already determined that public policy is only furthered when defendants afford agents like Hefler procedural safeguards before they exercise their power to review and terminate an agent's approval (29 CAB at 262-65; 33 CAB 170-71). Thus no doctrine of reasonableness can save the boycott here. As the court in Caceres, supra, reasoned:

Page 22.:

"[W]hether redeeming social good flows from the IATA arrangements has already been considered by the CAB which has set limits to the manner in which these useful purposes may be carried out. See 33 CAB 262-65. If the airlines, through IATA, have exceeded these limits, they cannot, it seems, fall back on the same justifications they relied on to obtain the Board's [original] approval...."

46 F.R.D. at 92-3 n. 1. See Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) and McCreery Angus Farms v. American Angus Ass'n., 379 F. Supp. 1008 (S.D. Ill. 1974) where the lack of procedural safeguards was a pivotal factor in finding alleged boycotts unreasonable and violative of Section 1."

"We conclude, therefore, that defendants' actions constitute violations of Section 1 of the Sherman Act."

"As interpreted by the courts, the offense of actual monopolization under Section 2 of the Act requires that the defendants possess (1) monopoly power in the relevant market, and (2) the intent and purpose to exercise that power to exclude competition. United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)."

"Monopoly power is defined as the power to control prices or exclude competition from the relevant market. Grinnell, supra, 384 U.S. at 571; United States v. E. I. DuPont * * *"

POINT I.

THE TRIAL IN THE SUPREME COURT WAS LIMITED TO THE ISSUE WHETHER NORTH SHORE TRAVEL HAD EARNED ENOUGH DEMERITS TO WARRANT A FIFTEEN (15) DAY SUSPENSION. BUT NORTH SHORE TRAVEL IS STILL OUT OF BUSINESS SO HOW CAN THE JUDGMENT IN THE SUPREME COURT BE RES JUDICATA OF THE FACT THAT NORTH SHORE TRAVEL IS STILL DENIED THE RIGHT TO DO BUSINESS MORE THAN TWO (2) YEARS LATER.

The original suspension was only for fifteen (15) days (133a), and the statement contained in the Opinion of Judge Mishler, that "the telegram was received from American Airlines only 12 days later" (136a), is erroneous. Judge Mishler was unaware that the telegram, from American Airlines to Darlene Dolan at the ATC (161a), was sent on August 20th, not August 9th, and mistook the date shown (Aug. 9th), in the first line of the message, sent to ATC, (161a) as being the date of the telegram:

"RE A. B. 634 AUG 9 NORTH SHORE TVL SVC * * * "

It has never been denied, through the different proceedings, that the telegram was sent and received on the sixteenth (16th) day (54a), nor has it been denied that the Replevin trial revealed that no moneys were owed American Airlines and that the telegram was sent as the result of personal spite (97a). Certainly this act alone was a violation of the Sherman Anti-trust Act.

It was not denied below that travel agents must secure a bond to maintain the right to sell airline tickets. That this bond could only be secured through Marsh & McLennan, Washington, D.C., and that because of this tie, the ATC has great influence with the company (76a). Consequently, the actions of the bonding company were the actions of ATC (76a). Therefore, when it was necessary to aid ATC, to get the Bank in Nassau to cooperate, the bonding company, suddenly and without notice to appellant, cancelled the Bank's Irrevocable Letter of Credit (77a). [This is in violation of Uniform Commercial Code of New York State, Section 5-106 [2]]. Then, in furtherance of the scheme to put North Shore out of business, ATC had its subservant Insurance Company attempt to cancel North Shore Travel's ATC Bond, which purported to give ATC the right to revoke North Shore Travel's right to do business. However, the revocation of the bond was a nullity (87a, 88a) and the acts of ATC was another violation of the Sherman Anti-trust Law.

POINT II.

THE REPLEVIN ACTION WAS NOT RES JUDICATA OF THE INSTANT ACTION.

In Moore's Federal Practice, Vol. 1. "Res Judicata defined", the following is found on page 24 :

> "If the judgment is in rem or quasi in rem, the judgment does not merge any in personam claim its plaintiff may have, not operate as a bar to such claim [22]."

The Judgment of Replevin was rendered in a New York State Court, and the New York Court of Appeals held to the same effect in Roach v. Curtis, 191 N.Y. 387, where the opinion of Willard Bartlett contained the following, at page 390:

> "We are of opinion that the judgment in replevin did not preclude the vendee from maintaining this suit. The action of replevin is essentially possessory in its nature. (Sinnott v. Feiock, 165 N.Y. 444). The issue litigated in a replevin suit is the present right to the possession of the property in controversy. Under the contract of sale on the installment plan between these parties, no title whatever had vested in the vendee at the time when the vendors thus sued her for the recovery of the goods (Empire State T. F. Co. v. Grant, 114 N.Y. 40), and hence she had no defense to that action. The judgment therein simply determined that the vendors were then entitled to the possession of the property which was the subject of the conditional sale and that determination had no bearing, directly or indirectly, upon her right under the statute to recover what she had paid on account of the purchase, in the event of the vendors' failure to sell the same after they had retaken it. The adjudication in the replevin suit was, therefore, no bar to her present claim and the trial court properly declined to give it effect as such."

The foremost authority in New York State is that of Carmody-Wait, Second Editior where the following is found in

Chapter 82, Section 82:187:

> "Conclusiveness on, and effect as res judicata against, defendant.
>
> The defendant in an action to recover a chattel is not barred by judgment against him from pursuing any other rights he may have aside from those based upon the right of possession. Thus, a judgment for possession of conditionally sold goods in favor of the vendor did not preclude the defendant purchaser from pursuing his statutory right to recover installments paid if the seller failed to resell the goods for the buyer's benefit in manner and time as then prescribed by law. * * * "

The Justice who tried the Replevin Action in the Supreme Court, Nassau County was well aware of this law as he refused to allow North Shore Travel to use violations of the Anti-trust Law as a defense in the Replevin Action:

> "THE COURT: In order that the record may reflect a conference that was held in chambers, I have advised the attorney for the defendant that I am not going to permit him to enter testimony relative to the Civil Aeronautics Board's attitude towards the ATC as to whether their practices are regular or irregular, because I feel that it has no probative value in the case at all. You may have your exception accordingly, Mr. Broderick.
>
> You may proceed, counselor." (83a).

POINT III.

THE DEFENDANTS ARE LIABLE TO PLAINTIFF FOR FAILING TO LIFT THE SUSPENSION AFTER NO ONE PROTESTED AGAINST SAME WITHIN THE FIFTEEN (15) DAY PERIOD.

The suspension was based upon a check being returned for "uncollected funds" after this check was rushed to the appellant's bank ahead, and instead of through the usual channels (check processed differently from other agent's checks). But the bank had misled North Shore Travel by sending a Notice that the check had been paid and thus prevented North Shore from going to the bank and demanding that same be paid at a time before North Shore's Bankbook and hypothecation had been subpoenaed to court and deliberately destroyed by the person who had received this vital evidence from the bank's employee (106a). North Shore asked to be reinstated (133a) on this ground, and within fifteen (15) days no one opposed. However, in spite of the rules North Shore Travel was not reinstated because on the sixteenth (16th) day the American Airlines opposed same without explanation, although to the knowledge of plaintiff's officers this opposition was based on personal grievances and not on reasonable grounds (97a) [Not denied by appellee, see Complaint (152a)]. Testimony at the trial showed that the American Airlines representative admitted receiving full payment

and that North Shore Travel did not owe American Airlines one-cent (97a). This certainly was an action that deprived defendants ATC of their immunity under the Sherman Law.

POINT IV.

THE WRIT OF SEIZURE IN TERMS VIOLATED THE CONSTITUTION OF THE UNITED STATES, HOWEVER, THIS QUESTION CANNOT BE PRESSED BECAUSE EXECUTION WAS FRAUDULENTLY ISSUED IN DEFENDANTS' HASTE TO DESTROY NORTH SHORE'S BUSINESS.

The Court below stated that North Shore Travel's challenge on the valitity of the writ could be challenged on certeorari (143a). Actually, the time to do so has not even matured so the Court could have granted such relief. The reason that same is unconstitutional is that under New York State Law, appellant had to provide a double bond and it was an impossibility for any ordinary travel agency, like North Shore Travel, to raise a one-million dollar bond. [Actually, the blank tickets were useless and had no value; Antar v. T.W.A., 66 Misc. 2d 93 aff'd. 37 App. Div. 2d 921]. In the case of LaPrease v. Raymours Furniture Co., 315 F. S. 716, the three-man Constitutional Court held that such a bond took them "into a murky and uncertain area" but it withheld judgment because the same question was before the Supreme Court of the United States in Sanks v. Georgia. However, before the Supreme Court could decide, the Legislature of

the State of Georgia changed the law and made the question academic, so the Supreme Court saw no reason to rule on the subject:

> Sanks v. Georgia, 399 U. S. 922; 400 U. S. 914; 401 U. S. 144.

However, there has been a shocking revelation herein (86a) that, although the demand was made by North Shore's counsel that a bond be filed before the writ of seizure be issued (127a) and that the writ recited that the bond was filed (127a), no bond was posted by appellee and no stipulation waiving same was offered by appellees' counsel. Counsel for North Shore moved on this ground and under the assumption that, Hintersehr, etc., had posted a bond (86a). The minutes of the hearing on the preliminary proceeding to granting the writ of Replevin read:

> "MR. BRODERICK: I won't consent to anything. Plaintiff has to submit the bond. [to] the Sheriff pursuant to Court order, the Sheriff is to hold these bonds [the chattels] pending determination of the trial." (127a).

This was followed by the Order of Seizure of the Honorable Beatrice S. Burstein, dated August 1, 1974, which order contained the following:

> "AND, it further appearing that an undertaking executed by sufficient surety as required by law having been submitted herewith," (127a).

The New York Civil Practice Law and Rules, Section 2104, reads as follows:

> "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."

No such order or stipulation was offered by defendants ATC's counsel. Thus, the Sheriff was fraudulently induced to go out with the writ to appellant's place of business (86a). The reason for this fraud and rush was to get the information in the newspapers (160a), and thus caused a run on appellant, [after appellees' agent showed this newspaper item to North Shore's customers (73a)], to redeem issued tickets, and this appellant did to the extent of $9,000 (73a). The defendants have refused to refund this money to appellant and their opposition carefully only states generalities and does not specifically point out a single dollar owed to them (126a). Consequently, this was another method illegally employed to put the plaintiff out of business by causing them to lose their monetary assets.

CONCLUSION.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE COMPLAINT REINSTATED TOGETHER WITH SUCH OTHER RELIEF AS THIS COURT SHOULD DEEM JUST.

Respectfully submitted,

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